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Keynote November 18, 2019**

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Minnesota Law Review Symposium Keynote
November 18, 2019

**Prisoners of Politics: Breaking the Cycle
of Mass Incarceration**

Rachel E. Barkow[†]

Thank you very much for having me. It's wonderful to be here and in particular to be talking about Frank Zimring's book.¹ I first met Frank shortly after I became a law professor. I don't know if you'll remember this, Frank, but it's in my mind quite clearly. I was in awe. It was a panel at Columbia Law School, I hadn't been in teaching for very long, and I was going to be on a panel with him. I was explaining the thesis of my paper, which was an argument that fiscal changes in the states were going to bring about bigger sentencing changes, and analyzing why they wouldn't happen at the federal level because they weren't suffering from the same kind of cost constraints and the politics were different.² I gave my presentation, and then, when it was Frank's turn, he said that I was practicing social science without a license. So, Frank, I remain an unlicensed social science driver, but I have nevertheless been asked to take the wheel again to comment on both your book and, I hope, mine. Thankfully for me, you do all the hard social science work in your draft and end up backing up observations that I make in my own book, in which I use more political economy and some of the politics and existing research and data that's out there on mass incarceration. But we reach many of the same conclusions, and even come to many of the same proposed policies. So if a lawyer like me and a social scientist like you end up in the same place, we're either

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1. FRANKLIN ZIMRING, *THE INSIDIOUS MOMENTUM OF MASS INCARCERATION* (forthcoming 2020).

2. See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1296–97 (2005).

both completely right or hopelessly wrong. But given your track record, I think we're right.

To set the stage for my remarks I want to start with the central point that Frank emphasizes in the draft of the book that I suspect will remain the same. And I highly recommend it, because even in draft version it's absolutely fantastic. One of the things he emphasizes is that, for all the talk around criminal justice reform in the United States and the emphasis that there's bipartisan movement to get things done, all the data and trends instead point to us continuing to live with mass incarceration and excessive criminalization in the United States for the foreseeable future.³ Frank explains in the book why there is so much momentum for mass incarceration, and reminds us just how modest the reforms we've seen so far have been.⁴

I'm kind of a glass-is-half-empty kind of person, and Frank's book gives me reason to be that way when it comes to criminal justice reform. Although more than half the states have lowered their incarceration rates, which is good, sixteen states report an increase in the number of prisoners in 2016 as compared to 2007.⁵ Moreover, if we look at the states that have lowered their prison populations, that decrease is actually pretty small when you compare it to the prison buildup that took place before that. There was an increase of seventy-seven percent between 1972 and 1981, but the decrease, from 2007 to 2016, was only about seven percent.⁶ So that's an eleven-to-one differential. So the glass is actually eleven-twelfths empty. The overall decrease was really driven by outliers like California, which was responsible for reducing the number of prisoners—and I'm getting a lot of these stats from Frank's draft—by almost 44,000 people.⁷ The other forty-nine states combined reduced it only by 38,000.⁸ This is just to give you an outline about how this is not a story of large-scale change happening everywhere.

What I want to emphasize in my talk today is that it's not a good thing that things are staying where they are, not only because of the human toll, not only because of the racial disparities

3. ZIMRING, *supra* note 1 (manuscript ch. 4, at 24–27).

4. *Id.* (manuscript ch. 5, at 33) “[B]usiness as usual’ in the United States of 2020 has incorporated all practices, attitudes and expectations of the fivefold expansion in rates of imprisonment.”).

5. *Id.* (manuscript ch. 1, at 14–15).

6. *Id.*

7. *Id.* at 15.

8. *Id.* (manuscript ch. 9, at 11).

and the disproportionate impact, but also because this is an abject failure if the goal is public safety, and if the goal is maximizing our limited resources in the best possible way.

I teach and write about criminal law and administrative law, as Maria [Ponomarenko] pointed out, and I have always been struck by the contrast between the two areas. In one space where I teach and talk about things, we value expertise, we value data, we do cost-benefit analysis, we make our policymakers explain why they're doing what they're doing, and they face judicial review to make sure they're not being arbitrary and capricious, and then in the other space, in criminal law, we just let policymakers go with their gut.

You know the expression when you are in law school that bad facts make bad law. Criminal law is basically writ large just one example of that. We get policies that are the result of bad facts that are on the news, or on social media,⁹ and they may feel emotionally satisfying at the time to segments of our electorate, who think that these policies are applying to the absolute worst kinds of crimes that they are reading and hearing about. But, in fact, these policies often make us less safe in the long term because of how difficult they make it for people to successfully reenter after they've served their terms of confinement, because of the hurdles we have set up.¹⁰

I think the way out of this is to recognize that we need to make criminal justice administration look more like the rest of administrative law. And I think Frank agrees. So, this is from a draft, but Frank points out that a truly sophisticated administrative law of crime can lead to a parsimonious and humane penal system.¹¹ Excessive punishment is evidence of, among other things, bad management.¹² I hope this stays in, Frank, because I agree with it, and I think this key about bad management and bad policies is really central for us to take a close look at because I think that for far too long the rhetoric—the bill of goods that have been sold to us—is that these are the policies we need to

9. Cf. Chelsea Jubitana, *Behind Locked Bars: The Role of Media and Mass Incarceration*, KENAN INST. ETHICS DUKE U. (Mar. 27, 2019), <https://kenan.ethics.duke.edu/behind-locked-bars-the-role-of-media-and-mass-incarceration-march/> [<https://perma.cc/SXN6-A8FT>] (commenting on the role that the media plays in the perception of mass incarceration in America).

10. See ZIMRING, *supra* note 1 (manuscript ch. 9, at 11).

11. *Id.* (manuscript ch. 8, at 24).

12. *Id.*

make us safer. That's the tradeoff. You have to accept this human misery; you have to somehow accept these racial disparities. That's the price for being safer and better off.¹³ And, in fact, I think what we find when we dig deeper, and I am going to explain some of these today, is that they are actually not good policies if that's the goal. They are failing in that effort.

Frank's book focuses largely on incarceration, but there is a host of surrounding policies as well that share this trait, that seem to serve this retributive urge for harsher punishment but ultimately represent in my view bad management. And in that I mean that they are failing their goal if the goal is to make the best use of our limited public resources. I am going to highlight just a few resources from my book to give you a sense of what I am talking about. The opening chapter explains a dynamic that we have in criminal law in the United States which is that we lump together people of really different levels of culpability and we treat them all as if they are the worst possible offense in that category.¹⁴ And there are lots of examples of this, but in the interests of time I'll just give you a couple.

I'll start with one that I think people have an intuitive sense wouldn't be like this—the category of sex offender. I think when the average person thinks about that term of sex offender they are probably thinking of people who commit violent acts of rape, people who molest children. But if you look at the actual laws that define who qualifies for being a sex offender you find they sweep more broadly than that. There was a Human Rights Watch [report], for example, that found five of the states require you to go on a sex offender registry if you visited a prostitute.¹⁵ Thirteen states will put you on the registry if you urinated in public.¹⁶ Twenty-nine states require registration for teenagers who have consensual sex with another teenager.¹⁷

13. Cf. Elizabeth Warren, *Rethinking Public Safety to Reduce Mass Incarceration and Strengthen Communities*, MEDIUM (Aug. 20, 2019), <https://medium.com/@teamwarren/rethinking-public-safety-to-reduce-mass-incarceration-and-strengthen-communities-90e8591c6255> [<https://perma.cc/E6JW-ULG3>] (“It’s a false choice to suggest a tradeoff between safety and mass incarceration.”).

14. RACHEL E. BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* (2019).

15. HUMAN RIGHTS WATCH, *NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 39* (2007), <https://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf> [<https://perma.cc/ZJK8-FBJ4>].

16. *Id.*

17. *Id.*

I could give you examples of the kind of cases that are particularly demonstrative of how irrational these policies are. A nine-year-old plays doctor with a six-year-old and ends up on the registry.¹⁸ One elementary school child plays a prank on a classmate and pulls down the kids pants; on the registry.¹⁹ There are not as many of those, but they are there. But, more critically, what it is dominated by are teenagers who get on registries after they sext with each other, after they send sexually-explicit photos of themselves to each other.

What is critical about this is that the sentencing and collateral consequences for people who are labeled as sex offenders are not based in thinking about the totality of this category. They are not thinking about the range of different people who are in it. They are not thinking about children playing pranks or people who go to people engaged in sex work or who are teenagers sending pictures to each other. They are set with the worst kinds of crimes in this category in mind. What ends up happening is you look around the country and what you find are very harsh mandatory minimum sentences. There are sex offender registration requirements that are often quite severe—often putting people on registries for life not to mention all kinds of bans on where people can live and where they are allowed to go.

It's not just true of this category of sex offender, it's true of a host of other categories and labels as well. You could look in our laws and find this just about everywhere. One example is we give collateral consequences to people who have felony convictions because they are all in the category of "felons." That is a really wide category of behaviors, and yet there are very harsh treatments that apply to everybody who is in that category. We sentence all drug traffickers, in many places, who deal in certain quantities of a certain type of drug the same. Wherever they fall on the drug trafficking hierarchy in their organization. It doesn't matter if they are a key manager versus someone who is just selling to support a habit. Their sentence and their treatment is largely driven by the quantity of the drugs and the type. Three strikes laws, recidivist sentencing laws for people who have

18. See Abigail Pesta, *The Accidental Sex Offender*, MARIE CLAIRE (July 28, 2011), <http://www.marieclaire.com/culture/news/a6294/teen-sex-offender> [<https://perma.cc/LTY4-XK48>].

19. See Sarah Stillman, *The List: When Juveniles Are Found Guilty of Sexual Misconduct, the Sex-Offender Registry Can Be a Life Sentence*, NEW YORKER (Mar. 7, 2016), <https://www.newyorker.com/magazine/2016/03/14/when-kids-are-accused-of-sex-crimes> [<https://perma.cc/7KBU-NKXL>].

repeat offenses, also tend to be these really broad categories of people all lumped in together.

The key part of this dynamic is, when they are lumped in like that, it's not that the sentencing range or the treatment of them reflects the wide variety; it's very often the case that they are all being treated as the worst among them. Now, this is disproportionate as a matter of retributive justice and thinking of the punishment that people deserve for what they've done. But what I want to emphasize is how pernicious it is for public safety, and I think the tendency might be that people think, well, you know, that maybe it's disproportionate as a matter of justice but if we give people longer sentences or we treat them more harshly, so what? Don't we get more deterrence that way? Isn't it better for public safety to do that? And what I want to point out is that the research tells us otherwise.

For starters, we've known for a while that it matters far more—for someone trying to decide if they are going to commit a crime—whether or not they are going to get caught as opposed to the sentence length that they face if they do. And, the assumption that more severe sentences are better also just focuses on the period that someone is incarcerated. We think that while someone is incarcerated they are incapacitated and they can't commit offenses outside of the facility they are held. We think that's a benefit. And it is.

But it's important to weigh that benefit against what happens when people get out. And, it's important here to note that ninety-five percent of the people who are incarcerated rejoin all of us.²⁰ They are part of our communities. We would want to know if their time incarcerated has an effect on them when they come out. And I think there has been a conventional assumption that, "Oh, it must be really great for that, because they are going to be deterred from doing things again," with not enough emphasis on, "what if their time while they were incarcerated actually was harmful from a public safety perspective?" What if, in fact, being in prison itself is criminogenic: if the environment is such that it makes it harder for people to reenter.²¹

20. COUNCIL OF ECON. ADVISERS, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE JUSTICE SYSTEM 39 (2016) (citing Michael Mueller-Smith, *The Criminal Labor Market Impacts of Incarceration* (2015) (working paper) (on file with author)).

21. See, e.g., Scott D. Camp & Gerald G. Gaes, *FED. BUREAU PRISONS & NAT'L INST. JUST. Criminogenic Effects of Prison Environment on Inmate*

Being separated from their social networks and the people that they love is actually harmful from a public safety goal. There is an interesting study out of Texas that finds that after a certain point in somebody's sentence each additional year that they serve causes a four to seven percent increase in their recidivism rate. That's a really important fact, because it suggests that there are these tipping points in long sentences where whatever benefit we were going to get from incapacitation is going to get outweighed by the harms to reentry when people come back out, from what those longer sentences are doing to them. And, if you stop to think about it, it makes sense because longer sentences for starters means that there are more people in prison and so there are fewer resources to go around for everyone.²² So, there's not enough programming for everyone.

It also ignores the fact that most people are going to age out of their criminal behavior.²³ I'll leave that to our expert criminologists to give you further detail on, but we've known this for a really long time.

We are putting people in prison and keeping them there long past the point when they would have aged out of whatever criminal behavior they are engaged in. At a certain point, we have incarceration reaching this sort of tipping point, and it is not going to be associated with a reduction in crime but an increase. Now, I can't tell you where that tipping point is, but I will tell you that, during my time on the [United States] Sentencing Commission, that's what I asked every single criminologist and data person that came before us, and no one is actually able to pinpoint it. But a rational conversation about criminal justice would recognize that it's there and seek to balance these tradeoffs between long sentences—that they're just not a complete good for public safety—just the opposite, that in fact they start to have just the opposite effect and make people less safe.

I will point to a couple of real-world examples of this, that we do know about, where we have seen jurisdictions reduce their sentences and that have not seen an increase in crime, which is

Behavior: Some Experimental Evidence (2004), https://www.bop.gov/resources/research_projects/published_reports/cond_envir/camp_gaes_c&d.pdf [<https://perma.cc/BB5J-LHUB>].

22. See ZIMRING, *supra* note 1 (manuscript ch.4, at 7).

23. See, e.g., Dana Goldstein, *Too Old to Commit Crime?: Why People Age Out of Crime, and What it Could Mean for How Long We Put Them Away*, MARSHALL PROJECT (Mar. 20, 2015), <https://www.themarshallproject.org/2015/03/20/too-old-to-commit-crime> [<https://perma.cc/29GG-ZEGL>].

one empirical way that you can demonstrate this. One example from my time on the Sentencing Commission is that we lowered all drug sentences—all federal drug sentences in the United States—by two levels in the guideline manual, which in practical terms ends up being about twenty-five months on average for a person.²⁴ That's a two-year reduction in sentence and we made this retroactive. And that meant that more than 30,000 people in federal prison were able to go before a judge and get their sentences reduced and were released early.

What is interesting about this decision is that we made it as part of a bi-partisan sentencing commission with four Democrats and three Republicans and we were unanimous. In this time in America you might ask how could that be, how could you get a unanimous decision out of four Democrats and three Republicans? And the reason is that we had data from when the Sentencing Commission had done this in the past. The Sentencing Commission had reduced crack sentences in 2007—had lowered them by two levels—and we were able to track what happened to the people who got the reductions over a period of five years. We could see whether it mattered that someone got their sentence reduced as compared to the people that served their full sentence, because the reductions came too late for them to get the benefit.

It was really nice because you could match people who were similarly situated for offense and criminal history and the only difference between them was that one group got this reduction and one group didn't. Five years later there was no statistically significant difference in their recidivism rates. In fact, the group that got the sentencing reductions had a lower rate. Looking at that enabled the Sentencing Commission to say unanimously that we can do this for all drugs and we can feel confident that we can lower sentences without a cost to public safety.

States around the country have done similar things. We have seen them reduce their sentences and their incarceration rates without upticks in crime. And I am confident we can do far more and not see an increase.

I want to spend a minute talking about how this relates to pre-trial detention as well. There are about half a million

24. See Press Release, U.S. Sentencing Comm'n, U.S. Sentencing Commission Votes to Reduce Drug Trafficking Sentences (Apr. 10, 2014), <https://www.ussc.gov/about/news/press-releases/april-10-2014> [https://perma.cc/P3Y9-LQQA].

people—a little shy of half a million people—who find themselves incarcerated before they have been convicted of any offense.²⁵ And, here too, we should ask: how does that work for public safety, would that be a good thing or a bad thing? And here, again, it's just like the story with incarceration and people sentenced after their conviction. If we stop for a minute and think about what it means to be detained pre-trial, it means that you are likely going to lose your job because your employer is not really going to wait around because you have been put in jail. You often lose your housing—you get evicted. You may lose your children—custody of your children—because there's no one to take care of them while you are incarcerated. This is a completely life-altering event for people, even when it's a short period of time.

When people have studied what does it mean to detain people pre-trial versus not, they have found that it increases recidivism risk.²⁶ It's a parallel story to the one that we see for people who are sentenced after conviction, where they are more likely to recidivate when they are released than the people who weren't detained and they control for criminal history and offence type. The idea is that there is something about the pre-trial detention itself, and they have found that that increase is true both for the risk of more felonies and the risk of more misdemeanors—so this is a risk of felony reoffending as well.

Here too, it's just to point out there are costs to these policies that I think are not part of our public discussion, because the public discussion is always just around the person who is released pre-trial who commits a violent offense and someone asks why they weren't detained. Whose fault was that? Was that the prosecutor? Was that the judge who screwed up, because surely the person should have been detained? Then there's often a push in jurisdictions to change their entire set-up of pre-trial detention and their whole bail regime to avoid that one case that makes it into the media. And what you don't get is a discussion of the flip side. There's not the news story that says, wow, our pre-trial detention policies dramatically increase the risk of

25. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/H55G-GVAT>].

26. See, e.g., CHRISTOPHER T. LOWENKAMP ET AL., LAURA & JOHN ARNOLD FOUND., *THE HIDDEN COSTS OF PRETRIAL DETENTION 4* (2013), https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf [<https://perma.cc/MHT7-PYAE>].

future crime because we are detaining too many people. Because that's not a news story. There are no statistical news stories. I would watch that network but not many people would. And so, as a result of that, we get a really jaded perspective on the costs and benefits of detention, both after conviction and at pre-trial.

Another flaw in our approach is thinking about what happens to people while they are detained. When we think about what makes them worse off, sometimes it's just being separated from social networks and people whom they love. But it's also that we don't make investments in programming.²⁷ This is a big theme in Frank's draft, and I believe will stay in the final book too (this is the awkward part about talking about a book that is not in its final form, but I feel confident it will stay in there as well). It's this idea that it's really important to ask what happens to people while they're incarcerated, particularly if we're not going to be reducing these populations any time soon.

It should be a real focus of our reform efforts to ask what we are doing while they are incarcerated. About eighty-five percent of the people who are incarcerated have a substance abuse problem. And yet, only about eleven percent of people get any treatment²⁸ We see the same thing if we ask about other categories like people with mental health needs and whether they are getting mental health treatment, or whether people are receiving cognitive behavioral treatment, vocational training, or educational programming.²⁹ These interventions are cost-benefit justified. They work.³⁰ They are good investments. If they were on my administrative law side of the ledger, they would all be upheld as good public policy interventions. But we are not doing that and instead less than ten percent of people who are incarcerated are getting this kind of programming, even though these would be good investments, and we would be saving far more

27. See ZIMRING, *supra* note 1 (manuscript ch. 1).

28. The NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., BEHIND BARS II: SUBSTANCE ABUSE AND AMERICA'S PRISON POPULATION i–ii (2010), <https://www.centeronaddiction.org/addiction-research/reports/behind-bars-ii-substance-abuse-and-america%E2%80%99s-prison-population> [<https://perma.cc/4WWM-UGVM>].

29. See BARKOW, *supra* note 14, at 61–67.

30. See, e.g., Carolyn Zezima, *Incarcerated with Mental Illness: How to Reduce the Number of People with Mental Health Issues in Prison*, PSYCOM (Mar. 5, 2019), <https://www.psycom.net/how-to-reduce-mental-illness-in-prisons> [<https://perma.cc/HF6Q-KDZ3>] (describing the successful Criminal Mental Health Project implemented in Florida).

money by making the investment because of what it would mean for reduced recidivism later and lowering incarceration.

We also don't do other things when it comes to confinement that, as a public policy matter, would make sense. These aren't so much about programming, but are just about the way that prisons operate. For example, we often put people far away from their families and their support networks, but that's a terrible idea if our goal is public safety.³¹ We want them to be near their communities, their families, the places where when they come out, they are going to get jobs.

Putting them far away is a terrible public policy idea if that's our goal.

Similarly, we want them in a place where people can easily visit, but we are making it hard for families, particularly families who are poor—they are disproportionately poor—and these visits are tremendously difficult for people.³² We make phone calls expensive even though that policy is terrible as a public policy matter.³³ We would want calls frankly to be free, because keeping people connected is really valuable.

We might ask, well, if these are all such great ideas, why aren't we doing them? One reason is that prisons are not held accountable for any of the outcomes that happen after people leave their custody.³⁴ We are not evaluating them and asking how did things work for the incarcerated person while they were with you? And then what happens to people later? When prisons are doing their own cost-benefit analysis, that is not a key part of what they are focused on.

When they are thinking about prison phone calls, they are thinking of, one, they can actually make a fair amount of money from their cut of charging people for calls and, two, they don't like some of the calls—you know not all of the calls are good calls.

31. See William D. Bales & Daniel P. Mears, *Inmate Social Ties and the Transition to Society: Does Visitation Reduce Recidivism?*, 45 J. RES. CRIME & DELINQ. 287, 304–05 (2008).

32. See Bernadette Rabuy & Daniel Kopf, *Separation by Bars and Miles: Visitation in State Prisons*, PRISON POL'Y INITIATIVE (Oct. 20, 2015), <https://www.prisonpolicy.org/reports/prisonvisits.html> [<https://perma.cc/9RZN-KN5F>].

33. See Wendy Sawyer, *Why Expensive Phone Calls Can Be Life-Altering for People in Jail – and Can Derail the Justice Process*, PRISON POL'Y INITIATIVE (Feb. 5, 2019), <https://www.prisonpolicy.org/blog/2019/02/05/jail-phone-calls/> [<https://perma.cc/X2FX-GBED>].

34. See Daniel Mears, *Accountability, Efficiency, and Effectiveness in Corrections: Shining a Light on the Black Box of Prison Systems*, 7 CRIMINOLOGY & PUB. POL'Y 143 (2008).

Some of the calls could be calls to engage in criminal activity, so they have to monitor those. They have to have a mechanism in place to monitor them.

But prisons only focus on those things when they are making their policies, and they are not thinking about this tradeoff which is good for the rest of us—that is good for the public—because, on net, charging people for calls does nothing to help with the monitoring—it just means that there are fewer calls, but it doesn't mean that people that can somehow afford to pay for them are less dangerous than people who can't.

It's also the case that, when prisons and prison officials are making decisions about other things within their four walls, they are really focused on the here and now for them. And it's not that they are engaging in bad faith—and I'm not suggesting that—I think this is just basic human behavior. If someone is misbehaving in front of them, and they think that solitary confinement is a basic disciplinary tool that they want to use because it helps them maintain order at the moment, they are going to think about that. They are not going to be thinking about the fact that putting someone in solitary confinement—in addition to being indescribably cruel, does damage that lasts when they come back out and so it's very hard from a readjustment perspective. But again, the official may not be balancing that out.

When we think about a setup like that, that doesn't hold prisons and their administration accountable for how their policies affect people when they come back out and rejoin society, we shouldn't really be surprised that they're not focused on it and that we have really abysmal recidivism rates for people when they come out of prison. More than seventy percent of those who are released have new arrests or convictions within five years after they come out.³⁵ I don't think we should expect much different outcomes if we're not evaluating prisons to try to get those rates lower and to try to have that be a more positive intervention.

Now the reason that doesn't happen is I think there is a tendency in our society to just blame the person. That is, there is a tendency to assume it is not the prison's fault, that it is the fault of the individual who comes out and decides to commit a new crime or who comes out and decides to keep taking drugs. And, if we see this as just a problem of personal responsibility, we

35. DUROSE ET AL., U.S. DEPT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, *RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005–2010* (2014).

never ask how prisons are doing, because we just think they are places that individuals will go and come back out and it's all on the individual. But that is a pretty strange way to view a massive government program of intervention. If you think about government programs, you would be hard pressed to find many bigger than our use of prisons and jails. This is a massive government intervention on an enormous scale, and we should be asking for government accountability. Are you doing a good job when you're doing this? Are you making things better? Are you making things worse?

I think you know we have gone away from that, because, in part, of this turn away from seeing the notion of rehabilitation as possibly being something that could happen. I think that is definitely something that occurred in the 1970s and 1980s, this idea that, well, things aren't working very well. The interventions aren't working very well, and then that led to policy changes that reflected the sentiment that really nothing works to rehabilitate. What you end up with is a focus on facilities that are really just warehousing people.

It has other effects as well. It leads to this idea not to ask what are the interventions in prison, but it also means that we lose a lot of the second looks at people themselves over time. Because if you don't think that people can change—if you don't think that's possible—then you don't need to look at them as time passes and ask if they have. That also explains why we have seen a decline in parole, why we have seen a decline in clemency and other second-look mechanisms.

I'll give you one example of that, which proves this point pretty well. There was a lot of talk about President Obama's clemency grants, which I was quite grateful for—that he granted as many people clemency as he did. But, if you look at what he did in historical perspective, what you notice is his overall grant rate didn't even exceed Ronald Reagan. And, President Nixon had more commutations than President Obama did.³⁶ So, although he talked about having numbers—clemency commutation numbers—that were higher than other presidents, actually his rate was fairly low. And you see that when you see how many

36. Rachel Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 437 (2017).

people he denied, which is more denials than any modern president by a mile.³⁷

Now is that because you needed to deny more people because the overall population of those incarcerated was somehow worse? I would argue just the opposite. We had expanded it so much to cover people who had committed drug offenses and who were there serving mandatory minimums where the judge really was not able to give the sentence that they wanted. If anything, the rate should have gone up. But I think part of this is just this political environment—that it's risky for any executive to give clemency because they too don't want that bad news story—the one case going awry. It is a common theme in criminal justice.

Now, in administrative law, we don't do that. We are not supposed to do that. We are supposed to rationally say, okay, the vaccine has this rare outcome in some cases but overall there are enormous public health benefits. The same with air travel: there may be an accident, but overall it is enormously beneficial for society, and so we try to figure out how to minimize risk while keeping the overall approach, which we know to be beneficial.

But, in criminal law, we don't do that kind of balancing. We let the outlier case drive what we do. Weirdly, it means that criminal law ends up being oddly frozen in time as well, because we make these decisions about people and sometimes we give them decades-long sentences—thirty years, twenty years—and don't reevaluate them even though it would defy everything we know about human nature to think that those people and their attitudes may not have changed. Or, for example, to assume that we as a society may not have changed how we view particular crimes. If you even just think about the changes in the perspective on marijuana over the years, I think it becomes obvious that you want to take second looks at things and reevaluate. But we have created an environment in many jurisdictions in the United States where that just isn't in the cards for folks. There is not going to be a second look. Even though we might have an initial panic over a kind of crime, we put the policy in place, and we don't get to revisit it. The politics of this make it very hard to do that.

37. See U.S. SENTENCING COMM'N, AN ANALYSIS OF THE IMPLEMENTATION OF THE 2014 CLEMENCY INITIATIVE 2 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901_clemency.pdf [<https://perma.cc/KH4E-CMYD>].

We've seen parole either disappear or decline dramatically in jurisdictions because of single cases of a parolee committing an offense.³⁸ We've seen the decline in clemency, in good time credits that people can earn while they're incarcerated, compassionate release, and retroactive adjustments.³⁹ Just to give you historical perspective, it wasn't always like this in America. We had seventy percent release rates for people on parole in the United States as recently as the 1970s.⁴⁰ Clemency was a routine thing that governors and the president had given before parole came on the stage to essentially replace it. So, between the two of them, we were actually giving lots of second looks in our system.

One more example that I want to give you is collateral consequences because I think you will see the same dynamic there as well. There are upwards of 47,000 collateral consequences for people who have committed crimes, and they range from making it more difficult for people to get housing and licenses to restrictions on voting.⁴¹ There are about nineteen million people who have been convicted of felonies in America so these are affecting an awful lot of people.⁴² And I just want to focus on the fact of how so many of these things make it very difficult for people to successfully rejoin after serving terms of incarceration and stay on a path of law-abiding behavior.

Take housing. Housing is a crucial need for people who are released from prison. A third of the people who are released from prison are homeless within six months and yet Congress has passed very strict bans on access to public housing. Some of the harshest target people who are engaged in drug trafficking.⁴³ So, if someone in your household is selling or using drugs, even if they are not doing it in the public housing itself, they are just

38. See PEW CHARITABLE TRS., MAX OUT: THE RISE IN PRISON INMATES RELEASED WITHOUT SUPERVISION 2 (2014), http://www.pewtrusts.org/~media/assets/2014/06/04/maxout_report.pdf [<https://perma.cc/R6RA-RDVA>].

39. BARKOW, *supra* note 14, at 78–87.

40. DORIS LAYTON MACKENZIE, SENTENCING AND CORRECTIONS IN THE 21ST CENTURY: SETTING THE STAGE FOR THE FUTURE 19 (2001), <https://www.ncjrs.gov/pdffiles1/nij/189106-2.pdf> [<https://perma.cc/U7HB-PDPV>].

41. Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 307–09 (2015).

42. *Id.* at 328.

43. Bruce Western et al., *Stress and Hardship After Prison*, 120 AM. J. SOC. 1512, 1526 (2015).

doing it some place, your whole household can be evicted.⁴⁴ Think about how hard it is to stay on a law-abiding path when you don't have a home, how much more difficult is it to go get a job. It makes everything harder.

Similarly, Congress, when it ended welfare as we know it in 1996, said to states that they had to impose lifetime bans on people with drug-related felony convictions from either getting federal welfare aid or food stamps.⁴⁵ Now, states can opt out of this. They can opt out of the lifetime ban and some have done so, but people with a felony drug conviction in America are still fully or partially excluded from food stamp benefits in thirty states and in thirty-six states from welfare assistance.⁴⁶ Again, this is transitional aid that really helps people make the transition into employment, but it's setting up a hurdle in their way.

Congress also created additional incentives for states to create more collateral consequences. It passed a law that said states would lose ten percent of their federal highway dollars unless the state passed laws to revoke or suspend driver's licenses of people who had been convicted of drug felonies.⁴⁷ Here too, some of the states have decided the money is not worth it. But there are still eighteen jurisdictions, which account for forty-eight percent of our country's residents, with a ban on a driver's license if you have this drug felony conviction.⁴⁸

In a majority of these jurisdictions, there are no more than two percent of workers who are able to rely on public trans-

44. 42 U.S.C. § 13662(a) (2018) (allowing public housing landlords to terminate housing for "any household with a member" who is determined to be using a controlled substance).

45. *Id.* § 862(a).

46. Rebecca Beitsch, *States Rethink Restrictions on Food Stamps, Welfare for Drug Felons*, PEW CHARITABLE TR. (Jul. 30, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/07/30/states-rethink-restrictions-on-food-stamps-welfare-for-drug-felons> [<https://perma.cc/QBW7-GPSZ>].

47. 23 U.S.C. § 159 (2018).

48. Joshua Aiken, *Reinstating Common Sense: How Driver's License Suspensions for Drug Offenders Unrelated to Driving Are Falling Out of Favor*, PRISON POL'Y INITIATIVE (2016), <https://www.prisonpolicy.org/driving/national.html> [<https://perma.cc/6MGE-5Q3L>]; Molly Davis, *Driver Licenses to No Longer Be Suspended for Drug Users*, LIBERTAS INST. (Mar. 15, 2018), <https://libertasutah.org/2018-bills/driver-licenses-to-no-longer-be-suspended-for-drug-users> [<https://perma.cc/F4H3-UC3F>].

portation to get to work.⁴⁹ Think about what the situation is for these folks: they have to decide whether they are they going to drive on a suspended license—there's no public transportation option—to get to work. What are they going to do?

We are making it really, really difficult for people to reenter society and make transitions to law-abiding behaviors. And, again, we are lumping all kinds of people together for these collateral consequences. There are many, many examples of these. I just wanted to give you a flavor of some of them.

The next key question is why do we end up with this result? I have already alluded to some of the political dynamics that create this. This system is really not the outcome of rational reflection, but dysfunctional politics. And, as Frank notes in his draft, the cumulative effect of this is that we end up with mass incarceration.⁵⁰ When we look at how this all happens, I think that one of the really important themes in his book is this idea that it's not that there was one central planner that did this. Instead, we have lots of pockets of discretion in American criminal policymaking.⁵¹ Prosecutors have discretion, judges often have discretion, governors, presidents to exercise clemency, parole officials—lots of actors with discretion. What's interesting is how basically the political climate creates a situation where those actors choose to exercise their discretion in a way that leads to enormous punitive consequences for people and, particularly, to prison.⁵² Because Frank's book notes that it's not that we see a general trend of creating new crimes or new maximum or minimum punishments. Instead, it's this dynamic of how people are letting politics affect their exercise of discretion.⁵³

So, what does that? What creates that kind of political environment that leads people to do this? We do have a political process that is focused on particular stories that get a lot of attention in the media. And if you study what the media covers you find there's a pretty steady drumbeat of offenses involving the most violent cases that make people really angry. Or they'll talk

49. See ADIE TOMER ET AL., METROPOLITAN POL'Y PROGRAM AT BROOKINGS, MISSED OPPORTUNITY: TRANSIT AND JOBS IN METROPOLITAN AMERICA (2011), https://www.brookings.edu/wp-content/uploads/2016/06/0512_jobs_transit.pdf [<https://perma.cc/YY4J-S4X7>].

50. ZIMRING, *supra* note 1 (manuscript ch. 1).

51. *Id.*

52. *Id.* (manuscript ch. 3).

53. *Id.* (manuscript ch. 8).

about sentencing—it's a focus on sentences that are too lenient—so that people get upset about that. Politicians know that's what's being portrayed. They also know that they can drum up support for themselves and get attention if they point out that there's things that people are afraid of or that make people angry.⁵⁴

And, in addition to the fact that elected officials do this, we now have a group of people that have a stake in keeping punishment the way that it is.⁵⁵ A financial stake for some because they are bail bondsmen and they don't want to lose the ability to continue to have their industry operate if there is pre-trial detention reform or if they make money off of prison phone calls. Or, if they have a professional interest that's maybe not strictly speaking financial, but it makes their job easier to have certain policies in place, which is certainly true, for example, for prosecutors whose jobs are tremendously easier if they have mandatory minimums to threaten people with and longer sentences if someone were to decide to exercise their trial right. So, you have all those folks with a stake in maintaining punitive practices because of how helpful they are in doing their jobs.

That creates a dynamic that makes it very hard to dismantle because it gives everyone the incentive to keep things how they are. And it all starts from a public mood that sentences are too lenient, because they are thinking about the cases that they're seeing. There is information in Frank's book that talks a lot about this, that there are people who have this view that sentences are too lenient.⁵⁶ There are studies that show this view is not tied to people who live in areas that have high rates of crime.⁵⁷ So, the sentiment is not related to higher crime rates to explain some of the things we are seeing. Instead, they just have a general sensibility, which I do think comes in part from how things get covered in the media. This mood that things are too lenient and how people view sentencing doesn't vary even while crime rates do.⁵⁸

54. *Id.* (manuscript ch. 3).

55. *See id.* (manuscript ch. 4).

56. *Id.* (manuscript ch. 8, at 15).

57. *E.g.*, THE SENTENCING PROJECT, CRIME, PUNISHMENT AND PUBLIC OPINION: A SUMMARY OF RECENT STUDIES AND THEIR IMPLICATIONS FOR SENTENCING POLICY (2001), https://www.prisonpolicy.org/scans/sp/sl_crimepunish_publicopinion.pdf [<https://perma.cc/5LBU-EYMR>].

58. *See id.* at 1.

It's not the case that the public mood is tracking crime rates nor is it the case that our incarceration boom is tracking crime rates. The incarceration boom may track this popular perception that things are too lenient and all these groups that want to have harsher sentences, but that is also not tracking crime rates. So, it is not the case that this is tied together in that way. Instead, there's a political dynamic that's working here about how people are thinking about crime, even if it's not borne out by actual statistics.

Frank's book reminds us that it's not just the public that thinks sentences are too lenient. He points out that the group of people who go into prosecution and law enforcement really have strong views on where sentences are, and that matters for a few reasons.⁵⁹ One is that it's really important to know that your district attorneys—people who are prosecutors—are really critical lobbyists for punishment policies in America. Their thumbprints are everywhere when you look at almost any law that affects criminal punishment. They, either directly as a district attorney or part of a lobbying association of district attorneys, are almost always in opposition to any kind of sentencing reform.

We are seeing it play out right now in New York where we passed bail reform, which is going to kick in in January [2020].⁶⁰ And they are sounding the alarms all over the place about how bad this is going to be. They have no data, but they are talking about individual cases. They are using anecdotes. They are using the same playbill that I'm sure you all know well. I'll give you an example, not from New York, but it's one of my favorites. This is from a district attorney in Lancaster County, Pennsylvania, who, as it turns out, had his own misbehavior, but before that happened and he got into trouble of his own, he was pushing for longer sentences for people who were selling heroin. He wanted to have much higher sentences in state prison, especially for repeat offenders, and he advocated for this. And now I'm going to quote him; I like this quote because it is so honest. He said, "I'm pissed off. And we need to do something about it."⁶¹

59. ZIMRING, *supra* note 1 (manuscript ch. 8).

60. See Elizabeth Janowski, *New York Bail Changes Set to Take Effect in January Despite Late Swell of Opposition*, NBC NEWS (Dec. 30, 2019, 6:00 AM), <https://www.nbcnews.com/politics/politics-news/new-york-bail-changes-set-take-effect-january-despite-late-n1099326> [<https://perma.cc/YJ5A-MJHA>].

61. Caitlin Sinett, *'I'm Pissed Off,' Lancaster County D.A. Taking a Stand Against Heroin Dealers*, FOX 43 (June 7, 2016, 4:56 PM), <https://www.fox43.com/article/news/local/contests/im-pissed-off-lancaster-county-d-a-taking-a-stand>

I actually think that's one of the more honest sentiments about how we ended up with where we are. If someone's pissed off, they think something's too lenient, they are mad about a crime they have just heard about, and they think we need to do something about it. And the something is a longer sentence; it's an expansion of some collateral consequence, and it makes it seem like they are doing something about the problem, and no one is bothering to ask: Does that something work? Is that the best thing we could do? And, in many cases, it's not, and it ends up being ineffectual, but it creates a political environment where it's very hard to be on the other side of this.

What you end up seeing from this political environment is that our institutional backgrounds and structures in the United States have changed over the decades, because. Although a lot of this was sparked by an initial rise in violent crime and a legitimate concern of people that we ought to do things differently, you know what I think is valuable—among many of the valuable things in Frank's book—is kind of how that then takes on a life of its own. You initially respond to an incidence of higher violent crime rates in the 1970s, for example, and 1980s, but you create all kinds of institutional changes as a result that long outlast why you created them in the first place.⁶² And then they are very hard to undo.

One of the things that ended up happening is that we had doctrinal changes that led to a decline in jury trials; that the Supreme Court says it's okay for prosecutors to threaten people with really long sentences if they go to trial and exercise their jury trial right.⁶³ People weren't sure the Supreme Court was going to say that was okay. It had been done, but it had been done on the down-low. Once the Supreme Court comes out and says that's okay, that diminishes the power of the jury. As does having more mandatory minimum sentences which makes it easier for prosecutors to say either plead guilty now or I'm going to charge you with this crime that has a mandatory minimum attached and then you will, if you are convicted, get ten years, twenty years, thirty years, life. Similarly, the increase of pre-trial detention means that people will plead to get out of jail—

-against-heroin-dealers/521-bb0f4410-beae-421c-ba9e-7388b79cf39a [https://perma.cc/7LWY-6QKA].

62. See ZIMRING, *supra* note 1 (manuscript ch. 3).

63. *Bordenkircher v. Hayes*, 434 U.S. 357, 364–65 (1978); *Brady v. United States*, 397 U.S. 742, 743–44 (1970).

they just want to get out, so they will plead and take time served.⁶⁴

You really see a decline in the jury as a result of these factors changing. We talked about the decline in clemency and parole—these second looks that take place. And we also really see far less court oversight. In part that is because of mandatory sentences that make it difficult for judges, in part because of some changes to the bench itself that I want to talk about. What you see are institutional changes that are really critical to pay attention to, because if you are going to dismantle this you need to think about these institutional dynamics and how you're going to undo them.

And, in addition to that, I think you also need to think about money. Some of the themes in Frank's book talk about this, this kind of insidious momentum as he describes it, of mass incarceration. So, we invested money in things: we hired more district attorneys, ADAs, more assistant prosecutors, and more law enforcement agents. Now, they are in place, and they have to do something, because they are there. When you build more prisons, you fill them, and it's very hard to close them, and it's very hard to lower the number of people who work in these jobs.⁶⁵ Those are really important changes that create a vested stake in keeping things as they are because people's livelihoods depend upon it.

In addition to that, to thinking about how law enforcement budgets have ballooned, Frank's book reminds us that it has created an environment and a culture where the measure of success for folks can be these long sentences. For prosecutors that's a badge showing that they have been good at their job. So we need to think culturally how that gets dismantled, because if that's the measure by which people are judging themselves then we would have to figure out what other measures could be used instead that may be better.

Again, think about the costs of how expensive incarceration is. Your local district attorney, when they put somebody in state prison, that doesn't cost them very much money because they don't have to pay for it. And so it's a free resource that as Frank

64. Cf. Hamilton Nolan, *Study: Pretrial Detention Makes Poor People Plead Guilty*, SPLINTER (Jan. 26, 2018, 12:22 PM), <https://splinternews.com/study-pretrial-detention-makes-poor-people-plead-guilt-1822448614> [<https://perma.cc/ACE4-KYGV>].

65. See ZIMRING, *supra* note 1 (manuscript ch. 3).

and his co-author had talked about before, amounts to a correctional free lunch.⁶⁶ It creates financial disincentives for reform.

In the time that I have left, I am going to quickly go through three pillars of reform that try to dismantle this institutional dynamic that I think are critical.

I want to start with prosecutors. They are actors who use their discretion to increase incarceration and so one corrective is to think about how to rein that in. There's a host of things that we could be doing on that score. One is thinking about the way in which they use pre-trial detention as a leverage point for themselves, and cash bail is often a big part of that. We can eliminate cash bail without any effects on public safety—it's just penalizing people who are poor. We could dramatically lower pre-trial detention, and that has an enormous effect on prosecutors' ability to leverage pleas. We could also eliminate mandatory minimums. So these are some policy things that are not only good policies in their own right, but they really do affect the leverage that prosecutors have. Open file discovery and second looks are also on that list.

But I think it's also important to focus on how you go about doing that—how you get that—and we are seeing a movement around the country to elect more progressive prosecutors.⁶⁷

And here, I will just say that and I'm happy to talk more about this in response to questions because my time is running out. When we are thinking about what it actually means for someone to be progressive, if your goal is actually to have a prosecutor who is focused on data and evidence and what actually works to reduce crimes, then they should be out there on the front lines advocating and lobbying for these changes even when it's against what might be the professional interest in making their job easier. They should be guardians of public safety more broadly and advocating for exactly these reforms that I am talking about.

There are other things that they could be doing as well, and I am happy to talk about that more when we get to questions if you have them, but one of them is also making them internalize the costs of incarceration, creating financial incentives so when

66. *Id.* at 26 (“Adversarial pressures step on the prosecutorial gas pedal. The correctional free lunch means that nobody puts on the brakes.”).

67. See Daniel A. Medina, *The Progressive Prosecutors Blazing a New Path for the US Justice System*, GUARDIAN (July 23, 2019, 2:00 PM), <https://www.theguardian.com/us-news/2019/jul/23/us-justice-system-progressive-prosecutors-mass-incarceration-death-penalty> [https://perma.cc/EF7Y-Z6CT].

they are deciding to send people to prison it's just not completely free for them. So, either financial incentives to give them rewards when they don't or penalize them when they do.

The second key reform and area of institutional change really does get at this idea of using the agency model. Because really prosecutors can't go it alone here, even the most progressive ones. They are not responsible for this whole category of criminal justice policies, and we do need people who take a coordinated approach to things. This is not a problem unique to criminal justice. This is a problem that is true across regulatory spaces and areas when we regulate health and safety. What we want is to make sure that we have people who are looking at the best evidence we have and doing the best they can with the information available to us. If we think about using an agency model, we can use that as a potential path forward. They could study incarceration policies, things like visitation policies, things like where people are confined, collateral consequences, second look mechanisms, and give us the best that we know on our existing knowledge.

Frank talks about using the agency model in his book as well. He talks about sentencing commissions as places that have done some good particularly when they have been limited by capacity constraints because those capacity constraints are very helpful in using limited resources. If you have to build additional prisons as a result of a policy change, then maybe we shouldn't do it given the cost.⁶⁸ Maybe we should find a way to think about, are there different policies we could pursue that don't cost as much. For example, Frank highlights, and many of us as well, the Minnesota Sentencing Commission, an administrative agency that has done a pretty good job in terms of using its ability to rationalize resources as a potential model.⁶⁹ I agree with that. I think the experience with sentencing commissions in the states backs this up.

Not all of them are great but on net they have actually done quite well. Sentencing commissions have gotten a bad rap because of the one that I worked for. And I totally get that, because that is true and it is important to ask why that sentencing commission was particularly bad and why the others have done better. And so, when we are thinking about using sentencing commissions or using agencies, it's important to take the best

68. ZIMRING, *supra* note 1 (manuscript ch. 3).

69. *Id.*

agencies that we've had using criminal justice policies, as opposed to looking at the worst and deciding it can't work at all. States with sentencing commissions have slowed the growth in corrections spending in their states and have saved money. And they have slowed the growth in incarceration. So this is a model that can work and we've learned some lessons from those commissions of how they can be designed. That's the key. You need to design these agencies to reflect the political environment in which they work, which means that they really do need to have kind of these capacity constraints built into their operation. Frankly, they need to look more like other administrative agencies that have to explain why they are doing what they are doing to courts, so that it's not just all politics, so you actually have policymaking that's not arbitrary and capricious.

I could say lots more about the agency model, but I want to be sensitive to the time and get to my third category of things, which is I want to bring the courts back into the conversation. When we think about what sparks change in American society, certainly it could be this movement to elect progressive prosecutors. That's good, certainly, to the extent that there is a movement for criminal justice reform, I hope it's used to have some of these agencies put in place because I think that's the kind of long term thing we need. But the other thing that can spark change is a court decision. When our courts protect constitutional values, that's actually critically important. The Supreme Court did this. California's reforms would have never gotten underway at all if it weren't for a Supreme Court decision in *Plata* that held that their prisons were unconstitutionally overcrowded.⁷⁰

If we think about the two biggest reasons for incarceration drops—the biggest incarceration drops—one was the U.S. sentencing commission. Thirty thousand people being let out of federal prison early is a big one.⁷¹ The other is the enormous drop in California, and it was sparked by a court decision. So, we see both the importance of an agency and we see the importance of a court. But *Plata*, and I cannot emphasize this enough, was an outlier Supreme Court decision. By and large, the Supreme Court has done nothing to check mass incarceration, and in fact it has done nothing even though there are doctrinal areas where it should be doing more.

70. *Brown v. Plata*, 563 U.S. 493 (2010).

71. See Justin Worland, *What Happened When California Released 30,000 Prisoners*, TIME (Oct. 7, 2015), <https://time.com/4065359/california-prison-release-department-of-justice/> [<https://perma.cc/XVU7-F5SS>].

We do, in fact, have an Eighth Amendment that bans cruel and unusual punishments, but the Supreme Court has done very little outside the death penalty to police it. It has created immunity doctrines for police and prosecutors out of whole cloth that are not to be found in the text of anything. It has failed to enforce the fact that you should not be imprisoned in America because you are too poor to pay. And federal courts around the country, unfortunately, are failing to enforce that protection so people are being incarcerated because of fines and fees that they have not paid.

When we think about why might that be, why do we have a bench that hasn't done more, I want to emphasize the fact of who's on it: lots of former prosecutors. And this is something I didn't need to limit to the bench by the way—we have former prosecutors kind of dominating public life. They run for office, they are governors and legislators. But I do want to focus on the fact that they are judges in disproportionate amounts. So, if you look at the federal bench, it is really an enormous number of people on the federal bench who have previously served as prosecutors. And, as compared to people who did public defense work, it's a four-to-one ratio.⁷²

And this imbalance persisted even under President Obama who claimed to be very interested in criminal justice reform. Before he took office, forty-three percent of the judges were prosecutors and ten percent had public defense experience.⁷³ After his eight years, forty-one percent had prosecution experience and fourteen percent had public defense experience.⁷⁴ So, the needle was moved only slightly. I was recently at an event at NYU that Judge Restrepo of the Third Circuit was at on this topic, and he did some of his own counting. He found that we have had nineteen Supreme Court justices with prosecution experience and zero with public defense. Of the 163 active circuit judges in the United States (these are appellate), fifty-seven were former prosecutors, five were public defenders. If you look at state courts, it's similar. States with elected Supreme Court justices, thirty-nine percent were former prosecutors, eight percent former defenders.⁷⁵ You might think it's better in states that appoint their

72. Barkow & Osler, *supra* note 36, at 472.

73. *Id.*

74. *Id.*

75. Cf. Gregory L. Acquaviva & John D. Castiglione, *Judicial Diversity on State Supreme Courts*, 39 SETON HALL L. REV. 1203, 1225 (2009); Casey Tolan,

justices. In appointed jurisdictions, fifty-three percent were former prosecutors, and three percent were former defenders. In addition, CATO did a study of judges on the federal bench and asked what the numbers looked like if you didn't even limit yourself just to criminal prosecution on the government side—so including government-side civil enforcers. And when you do that, it's a seven-to-one ratio in favor of people who worked for the government.

I think that's really important. I think it's really important to ask if it's healthy to have a bench that's this imbalanced when their role is to check the government, their role is to help check the government against individual abuse. I think it's really important to have more people on the bench who have spent careers representing individuals against the government and protecting individual liberties. I think it should be a critical path for reform, that we think about this imbalance on both the federal and the state bench. I think it's part of Frank's point about actors with discretion, and I think courts are a big part of that. These folks have a lot of discretion, and I think people who are interested in criminal justice reform who are focused on prosecutors should in addition really think about judges as well. And so those are my big three institutional pillars. I will stop there, and I think there is time for questions.